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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, AND ITS LOCAL 840,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

PIASECKI AIRCRAFT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

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PIASECKI AIRCRAFT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 840, pray that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the Third Circuit entered on July 13, 1960, denying the petition filed by the Petitioners to review and modify the order issued by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pages 47 to 77) is recorded at F. 2d . The decision and order of the Board (P[1]–249a-257a) is recorded at 123 NLRB No. 43.

JURISDICTION

The opinion of the court below was filed on June 20, 1960, and its decree was entered on July 13, 1960. The jurisdiction of this court is invoked under 20 U.S.C. 1254 and Sections 10(e) and (f) of the National Labor Relations Act, as amended, (61 Stat. 146, 29 U.S.C. 160(e) and (f)) hereinafter called the "Act."

QUESTIONS PRESENTED

1. The Petitioners were the certified bargaining agents for an appropriate production and maintenance unit and an appropriate office and clerical unit at the New Castle plant of the Bellanca Corporation. For approximately fifteen years the Petitioners and the Bellanca Corporation engaged in collective bargaining and had executed collective bargaining agreements. The most recent collective bargaining agreement was dated June 1, 1955. Prior to the expiration of such agreement, on October 24, 1956, Piasecki Aircraft Corporation, hereinafter referred to as "Piasecki", by a written instrument agreed to purchase all assets of the Bellanca Corporation located at New Castle, Delaware, including land, buildings, machinery, equipment and other property, work-in-process, materials, supplies, hardware,

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[1] The references "P", "U" and "B" designate those portions of the record printed as appendixes to the briefs of Piasecki Aircraft Corporation; International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 840; and the National Labor Relations Board, respectively.

small tools, designs, patents, licenses, copyrights, etc., and leaseholds. Bellanca agreed to assign to Piasecki all current work contracts to the extent that such contracts were assignable and to permit Piasecki to contact its customers with the object of retaining such contacts for future deliveries. Piasecki agreed to assume the payment of the outstanding balance on a mortgage executed by Bellanca to the Equitable Insurance Trust Company, Wilmington, Delaware. The agreement required Bellanca to terminate, and Bellanca did terminate, all employees covered by the collective bargaining agreement of June 1, 1955, effective November 23, 1956. The agreement also required Bellanca to terminate the collective bargaining agreement of June 1, 1955. No finding was made by the Trial Examiner, the Board or the lower court that such agreement was terminated. Between October 24 and November 23, 1956, Piasecki integrated its operations with those of Bellanca and utilized Bellanca facilities and personnel by working with Bellanca's Superintendent Pasquarella in estimating future personnel needs and planning assumptions, conferred with and offered jobs to supervisory personnel, made all purchases for work-in-process utilizing Bellanca personnel, performed some of its own work in the plant, utilized Bellanca employees for the purchase of materials for work to be completed after November 23, and caused the discharge of all employees covered by the agreement between Bellanca and the Petitioners. After November 23, Piasecki continued the work-in-process of Bellanca and endeavored to complete, with few exceptions, all the contracts which Bellanca had been unable to finish. Piasecki purchased most of the work-in-process and then endeavored to renegotiate all the uncompleted contracts with Bellanca's customers. Although some of the nonoperative departments were moved to Piasecki's plant at Philadelphia, Pennsylvania, the production departments such as the machine shop, weld room, paint shop,

and related sections in the Bellanca plant were left largely intact. The entire supervisory hierarchy, with the exception of corporate officers, was hired, and it was the plan of Piasecki's management to hire most, if not all, of the rank and file production and maintenance workers in the Bellanca plant. Except for the use of a few loft men (9 jobs), new work obtained for the plant could have been handled by Bellanca personnel. The operations of the plant under Piasecki were substantially similar to what they were under Bellanca. The first question presented is: Under such circumstance did the Petitioners' certifications as bargaining agents under Section 9(a) of the act survive the change of ownership obligating Piasecki to bargain with the Petitioners upon request in conformity with Section 8(a)(5) of the Act as a successor in the "employing industry" from the time it acquired Bellanca's assets, even though Piasecki declined to hire any of the former Bellanca in-units personnel? A correlative question is: Under such circumstances was it in contravention of the Act and in excess of the Board's delegated powers for the Board to remove Piasecki as an "employer" and its predecessor's employees as "employees" from the coverage of 8(a)(5) of the Act and to decline to exercise jurisdiction over the "employing industry" continued by successor Piasecki on the ground that the predecessor's employees did not become "his employees" within the meaning of Section 8(a)(5) of the Act?

2. Assuming *arguendo* that the first question is answered in the negative, the second question is: Was Piasecki obligated to bargain with the Petitioners upon request in conformity with Section 8(a)(5) of the Act because it, together with Bellanca, exercised managerial control from October 24 to November 23, 1956 over Bellanca's operations and personnel and effected the discharge of Bellanca's in-units personnel?

3. Assuming *arguendo* that the first and second questions are answered in the negative, the third question is: Did the fact that Piasecki hired two former Bellanca employees in the office and clerical unit and one employee in the production and maintenance unit obligate it to recognize and bargain with the Petitioners upon request for such units in conformity with Section 8(a)(5) of the Act?

4. Assuming *arguendo* that the first, second and third questions are answered in the negative, the fourth question is: Did the fact that, had Piasecki not engaged in illegal discrimination because former Bellanca employees demonstrated their continued adherence to the Petitioners, Piasecki would have become the employer of such employees in the appropriate units on November 26, 1956, and the Petitioners would have represented a majority of such employees on such date in such units, obligate Piasecki to recognize and bargain with the Petitioners upon request in the appropriate production and maintenance and office and clerical units on and after November 26, 1956?

5. The complaint charged a violation of Section 8(a)(5) of the Act in general terms. The collective bargaining agreement which was in effect between Bellanca and the Petitioners provided that it shall be binding upon the successors and assigns of the parties, except that it may have been terminated in the event the plant or business of the company shall have been sold, assigned or transferred, upon an appropriate notice in writing given at least fifteen days prior to the consummation of such sale, assignment or transfer. Piasecki in its answer averred that such contract terminated November 1 in accordance with its terms. Neither the Trial Examiner, the Board nor the lower court found that such contract was terminated. Petitioners contended that such contract was binding upon Piasecki, for which reason Piasecki was obligated to bargain with Peti-

tioners during the period of the contract and with respect to any question arising thereunder. The General Counsel did not join in such contention but argued that Piasecki was obligated to bargain as a successor in the employing industry. The fifth question is: Under these circumstances, may the Board reject the contention of the charging party without passing on its merits, on the sole ground that the General Counsel declined to join in such contention or legal position?

6. The sixth question is: In order to terminate a collective bargaining agreement by its terms binding upon the successors and assigns of the parties, must the notice of termination be given in conformity with Section 8(d) of the Act, regardless of the agreement's terms for termination?

STATUTES INVOLVED

Pertinent provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are as follows:

> "It shall be an unfair labor practice for an employer • • • (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. 158(a)(5)
>
> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder • • •" 29 U.S.C. 158(d)
>
> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *"
29 U.S.C. 159(a)

STATEMENT

I. The Facts

Petitioners (sometimes referred to herein as "Charging Parties" or "Unions") herein were certified collective bargaining agents for a unit of office and clerical employees and a unit of production and maintenance workers at the Bellanca Corporation located in New Castle, Delaware, respectively in December 1941 (Matter of Bellanca Corporation, Case No. IV-R-799) and in April 1942 (Matter of Bellanca Corporation, Case No. IV-R-888).

As such collective bargaining agents, the Unions had executed successive contracts for approximately 15 years. The last of such contracts was dated June 1, 1955 and was to remain in full force and effect for a period of two years from such date and for additional periods of one year thereafter unless terminated in accordance with the provisions of such contract. The contract contained a provision whereby it was binding upon successors and assigns of the parties thereto, except that it may have been terminated in the event the plant or business of the company located at New Castle, Delaware, should be sold, assigned or transferred to a person, firm or corporation that was not affiliated with the company. To effect a termination, Bellanca was obligated to notify the Unions in writing at least fifteen days prior to the "consummation of such sale, assignment or transfer." (G.C. Ex. 3) Neither the Trial

Examiner, the Board nor the lower court found that such contract was terminated.

By an agreement entered into on October 24, 1956, Piasecki Aircraft Corporation agreed to purchase from Bellanca Corporation substantially all of its assets. (G.C. Ex. 2, U-90a) After the acquisition of Bellanca's assets by Piasecki, the Petitioners communicated with Piasecki, without response. The Trial Examiner said:

> "It is undisputed that the Union requested recognition and a bargaining conference with the Respondent on several occasions on and after November 26 and that the Respondent declined to recognize or to meet with the Union. By letter on November 30, the Union renewed these demands and enclosed photostats of 143 authorizations signed by Bellanca employees on or about November 20. There were 139 employees in the production and maintenance unit on November 23 when Bellanca ceased operations. * * *" (P-215a-216a)

After acquiring the Bellanca assets, Piasecki sent applications of employment to the Bellanca employees. Prior to November 24 all former in-unit Bellanca employees returned applications. (P-96a) It was Piasecki's intention to continue Bellanca's operations with Bellanca personnel. (U-19a) Piasecki hired all of Bellanca's supervisors, including the plant superintendent, Gus Pasquarella. Pasquarella testified that he had discussed the employment complement for November 25 with Piasecki personnel and that they "had a list of a certain amount of names. I don't remember the number—thirty to forty, I would say." (U-16a) Former Bellanca personnel from the production and maintenance unit had been selected prior to November 26, the date on which Piasecki intended to continue the Bellanca operations. (U-23a)

The Trial Examiner described the operations after November 26 as follows:

> "* * * the Respondent endeavored to complete, with few exceptions, all the contracts which Bellanca had been unable to finish. Piasecki purchased most of the work-in-process and then endeavored to renegotiate all the uncompleted contracts with Bellanca's customers. Although some of the nonoperative departments such as purchasing, engineering and tool designing were moved to Philadelphia, the production departments such as the machine shop, weld room, paint shop and related sections in the Bellanca plant were left largely intact. The entire Bellanca supervisory hierarchy, with the exception of the corporate officers, was hired, and as seen from the findings above, it was plainly the plan of the Piasecki management to hire most, if not all, of the rank-and-file production and maintenance workers in the Bellanca plant. * * * That the operations of the plant under Piasecki were very similar to those when it was under Bellanca's management is manifest from the testimony of Gustave Pasquarella. * * * However, from the findings set forth above, as to the actual work load at that plant subsequent to November 26, it is apparent that the Respondent's operations there were substantially similar to what they were under Bellanca." (P-211a-212a)

On or about November 16, Piasecki decided that all applicants for jobs would have to be interviewed at the plant on November 24. On that date and November 25 and thereafter, Piasecki locked out and refused to interview all of the former Bellanca employees except Estrina Susi, a production worker, and Ann Chirco and Rose DiPetrapaul, clerical workers, who were hired.

Thereafter Petitioners filed unfair labor practice charges and placed a picket line around the plant, charging Piasecki with a lockout. In due course a complaint was issued.[2]

II. The Trial Examiner's Findings and Conclusions

The Trial Examiner found that Piasecki locked out former Bellanca employees on November 25 and thereafter because of their affiliation with the Unions and that it did not hire former Bellanca employees because of its continuing discrimination against all job applicants who were affiliated with the Petitioners. The Trial Examiner also found that the lockout of such applicants on November 25 and thereafter was discriminatory and in violation of Section 8(a)(3) of the Act, and that the solicitation of Bellanca employees by Piasecki to abandon the Unions constituted discrimination within the meaning of Section 8(a)(1) of the Act. In this respect the Trial Examiner recommended the usual remedial order. The Trial Examiner also recommended dismissal of the complaint insofar as it alleged that Piasecki unlawfully refused to bargain with the Petitioners.

While the Trial Examiner found all the elements of a successorship, he distinguished the instant case from prior Board and court cases on the ground that:

> "Here there was no identity of the parties as between Bellanca and Piasecki,[3] nor was there a recent certification of the Union. Moreover, although there was a transfer of the supervisory personnel and much of the work-in-process, there was no assumption of liabil-

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[2] The Trial Examiner's Report and the Board's decision are printed at P-187a-243a and P-249a-257a, respectively.

[3] Such conclusion was contrary to his own findings supporting a conclusion that Piasecki had exercised managerial control along with Bellanca between October 24 and November 23.

ities [4] nor was there a transfer of a trade name or good will.[5] For these reasons I conclude and find that Piasecki was not a successor to Bellanca within the meaning of the Act. * * *"

The Board did not adopt the conclusions and findings of the Trial Examiner in respect to Piasecki's successorship status. Nor did the Board pass on the question as to whether or not Piasecki was a successor in the "employing industry." As will appear hereafter, the Board dismissed the refusal to bargain charges on an entirely different ground.

The Trial Examiner dismissed the Charging Parties' claim that Piasecki, by reason of the binding effect of the Bellanca contract, was obligated to bargain during the period of the contract and with respect to any question arising thereunder, on the sole ground that the General Counsel did not join in such claim.

While the Trial Examiner found that "the Bellanca employees, as applicants for employment with Piasecki, were employees within the meaning of the Act," the Trial Examiner did not consider nor find that by reason thereof such employees constituted employees for the purpose of determining the majority status of the Unions and that the obligation to bargain arose and continued from the date of such discrimination because the majority of such employees had designated the Petitioners as the bargaining agents.

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[4] Contrary to the Trial Examiner's findings, Piasecki agreed to "assume the outstanding balance on a mortgage executed by Bellanca to the Equitable Insurance Trust Company". (U-91a)

[5] Contrary to the Trial Examiner's findings, Piasecki purchased "designs, patents, licenses, copyrights, etc." (U-91a)

III. The Board's Decision and Order

The Board in its decision and order agreed with the Trial Examiner that Piasecki had violated Section 8(a)(3) of the Act by discriminatorily refusing to hire approximately 140 production and maintenance employees of Bellanca during the period from November 25, 1956 until approximately March 1957. The Board, on a different ground, affirmed the Trial Examiner's dismissal of the allegation that Piasecki refused to bargain, "because the discriminatees, none of whom were hired, did not become the Respondent's employees within the meaning of 8(a)(5) of the Act." The Board did modify the Trial Examiner's recommendations in that it found that, had not Piasecki engaged in illegal discrimination, Piasecki would have become the employer of the employees in the appropriate production and maintenance unit represented by the Unions and as such would have been obligated to bargain with the Unions upon request. The Board found that Piasecki thus had sought to avoid its obligation to bargain by engaging in unlawful discrimination. The Board further ordered Piasecki to bargain with the Unions upon request as soon as Piasecki employed the discriminatees. Such was in addition to the remedy recommended by the Trial Examiner. The Board did not specifically pass on any of the questions raised by the instant petition.

IV. The Decision of the Court Below

While the Board did not specifically note the Petitioners' objection to the Trial Examiner's confinement of the submission of contentions to the legal position taken by the General Counsel, the court below, in answer to the Petitioners' objection, concluded that the Board was within its province in according to the General Counsel the determination of the scope of the complaint and that it was

within his domain to formulate the complaint and its prosecution. In this connection, the court further held that Section 8(d)(1), which provides for a sixty-day notice for contract termination, did not embrace Piasecki, "not a party to the contract." The court did not, as urged by the Petitioners, remand the case to the Board for a determination of the binding effect of the contract upon Piasecki.

The court dismissed the Petitioners' argument that Piasecki was obligated to bargain as a successor in the employing industry, on the ground that the Board determined that "Piasecki was not Bellanca's successor," although the court found the Board was not "deterred from regarding the same workers in the generic sense within the meaning of 8(a)(1) and 8(a)(3)."

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT

I. *The lower court in exonerating a successor employer in the employing industry from the obligation to bargain under Section 8(a)(5) and 9(a) of the Act with the certified bargaining agent of its predecessor's employees and in effect nullifying such bargaining agent's certification for the same bargaining units continued by the successor, has approved the Board's withdrawal of jurisdiction over the employing industry imposed by statute and has rendered a decision in conflict with principles accepted and applied in other circuits and this court and has decided an important question of federal law which has not been but should be settled by this court.*

The court below dismissed the Unions' contention[6] that Piasecki was obligated to bargain with the Petitioners as a successor in the employing industry, by stating: "This

[6] The General Counsel had urged the same contention before the Trial Examiner and the Board. (U-77a)

and other similar arguments are inapplicable in the face of the Board's determination that Piasecki was not Bellanca's successor."

In arriving at this conclusion we believe that the court has misconstrued the import of the Board's decision. The Board did not find that Piasecki was *not* Bellanca's successor. In fact, it specifically avoided the adoption of the the Trial Examiner's finding to such effect [1] by dismissing the complaint insofar as it had alleged that Piasecki had violated Section 8(a)(5) of the Act "because such discriminatees [former Bellanca employees], none of whom were hired, did not become the Respondent's employees within the meaning of Section 8(a)(5) of the Act." Thus the Board's rationale is equally applicable whether Piasecki is or is not considered a successor in the "employing industry." Moreover, proof that the Board did not pass on the question as to whether Piasecki was a successor in the employing industry is apparent from the fact that the Board in its brief filed in the court below relied upon *Page Aircraft Maintenance, Inc.*, 123 NLRB No. 23. *Page Aircraft* held that Section 8(a)(5) was not applicable since the predecessor's employees did not become the successor's employees.

On the other hand, *NLRB* v. *Colten*, 105 F. 2d 179 (C.A. 6), establishes that the Board has jurisdiction over the "employing industry" and that it was the intent of Congress to regulate the employing industry. The Board refused to assert such jurisdiction in the instant case and

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[1] The Board no doubt rejected the Trial Examiner's findings on successorship since his findings were adverse to the Board's precedents. The cases of *Southerland's Tennessee Company, Inc.*, 102 NLRB 1178, and *M. M. Joffee*, 74 NLRB 1568, which the Trial Examiner did not cite, are in contradiction to the artificial and arbitrary criteria he applied to sustain his dismissal of the 8(a)(5) violations.

removed the employer, as well as the predecessor's employees, from the coverage of Section 8(a)(5) of the Act on the sole ground that the successor in the employing industry declined to hire any of its predecessor's employees. The result of such holding places it within the power of a successor employer to oust the Board of jurisdiction over the employing industry in respect to the application of 8(a)(5) of the Act by declining to hire its predecessor's employees, and this is true under the lower court's holding, whether the successor employer does or does not discriminate against this predecessor's employees.

First. In exonerating Piasecki from the obligation to recognize and bargain with the Petitioners and in removing it and its predecessor's employees from the coverage of 8(a)(5) of the Act, and in refusing to exercise jurisdiction imposed by statute, the Board and the lower court have departed from the teachings of this court and lower federal courts and the intent of Congress to the effect that the Act shall be construed and applied to promote the practice and procedure of collective bargaining and to encourage the employer and the representative of his employees to establish through collective negotiations their own charter for the ordering of industrial relations and thereby to minimize industrial strife. *Local 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers* v. *Oliver*, 358 U. S. 283, 295; *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 10; *Phelps-Dodge Corp.* v. *NLRB*, 313 U. S. 177; *Brooks* v. *NLRB*, 348 U. S. 96; *Agwilines, Inc.* v. *NLRB*, 87 F. 2d 146 (C.A. 5); *NLRB* v. *Adel Clay Products Co.*, 134 F. 2d 342, 346, 348 (C.A. 8). In fact, *NLRB* v. *Colten, supra*, which established the principle that it is the "employing industry" which the Act seeks to regulate, and with which the lower court's opinion

is in conflict, planted its conclusion squarely on the policies of the Act to promote industrial peace and prevent industrial war:

> "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act *in the interest of industrial peace* • • •" (Italics ours)

In *Local 976, United Brotherhood of Carpenters, etc.* v. *NLRB*, 357 U. S. 93, the court said:

> "Most relevant, of course, is the very language in which Congress has expressed its policy in which the court must extract the meaning most appropriate."

The history of labor unrest at the Piasecki plant, which manifested itself in the establishment of a lockout picket line, is convincing proof that the Board, with lower court approval, has robbed the Act of its vitality and has fixed a rule which will promote industrial strife and frustrate the "practice and procedure of collective bargaining." In doing this, the lower court is in conflict with the decisions of this court. Moreover, the Board's decision departed from its own teachings in *Syncro Machine Co., Inc.*, 62 NLRB 985, 991 (a successorship case). The Board said:

> "The Respondent [by its refusal to bargain] thereby forestalled the peaceful settlement of these sources of industrial unrest and thwarted the statutory policy of encouraging collective bargaining."

Indeed, by refusing to apply the provisions of 8(a)(5) of the Act to a successor employer who declined to hire its predecessor's employees, the Board and the lower court have withdrawn the Board's plenary jurisdiction over the

employing industry in contravention of the intent of Congress to regulate the employing industry in its entirety.

The importance and need of reversing the Board and lower court can hardly be overemphasized. Between 1951 and 1956 there were 4,686 reported acquisitions. (Business Record May 1957, Vol. 14, No. 5, Table I, article entitled "Economic Pattern in Merger Cases"; Source: Federal Trade Commission's Press Release of February 14, 1957) In 1957 there were 1,113 reported acquisitions. (Source: Office Memorandum to Quincy Adams, Chief, Division of Economic Evidence and Reports, dated January 31, 1958) In 1958 there were 1,074 reported acquisitions. (Source: News Release, Federal Trade Commission, January 28, 1959) In the first 6 months of 1960 there were 525 reported acquisitions. (Source: Memorandum to Basil J. Mezines, Acting Executive Director, Bureau of Economics, dated July 12, 1960) Had they all been Piasecki acquisitions, a national catastrophe would have taken place.[8] The magnitude of this potential area of industrial conflict marks the need and wisdom of implementing the statutory supervision which Congress intended.[9] The rule promulgated by the Board is an invitation to successor employers to compel employees to resort to industrial strife to protect benefits which have accrued to them in the employing industry during the period of a predecessorship; it sanctions an expedient whereby employers through the sale or transfer of assets may not only avoid their own contractual obligations but can guarantee to their successors a means by which they may avoid a continuation of bargain-

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[8] Acquisitions have affected thousands of the Petitioner's members. (See Appendix B)

[9] H. R. Rpt. No. 1147, 74th Congress, (S. 1958), page 20 in referring to Section 8(a)(5) states: "The fifth unfair labor practice, regarding the refusal to bargain collectively, rounds out the essential purpose of the bill to encourage bargaining and the making of agreements."

ing in the employing industry; it leaves a predecessor's employees totally unprotected by Section 8(a)(5) of the Act. Thus unions must resort to the picket line and industrial warfare or abandon their members and their representative status. With the precedent firmly established that the successor may lawfully decline to bargain with a union or hire its predecessor's employees, unions will be encouraged to strike against the predecessor employer prior to acquisition and to erect defensive roadblocks in the path of a peaceful transfer of the employing industry from predecessor to successor.[10] The consequences of such rule are incongruous with the Act's desired results. Moreover, employees with many years of seniority, who may lose years of acrued benefits and who may have reached an age where their employment is not attractive to employers, but whose qualifications for employment otherwise would be suitable, are cast upon a labor market to flounder about with a strong probability that they will end up on public relief—too young to retire, yet too old to be wanted. Such inhuman results do violence to the policies of the Act and the teachings of this court.[11] Surely such a vicious construction of the Act ought not to be indulged unless *clearly compelled* by the Act. This court has said in *NLRB* v. *Lion Oil Co.*, 352 U. S. 282, 289:

> "We find our guide to the general context of the statute in Mastro Plastics. In that case we recognized a 'dual

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[10] No doubt with this probability in mind Bellanca closed its doors the day before Thanksgiving in order to induce its employees to stay on the job, since had they discontinued work prior thereto they would have lost their Thanksgiving holiday pay.

[11] The Civil Aeronautics Board has solved the employees' problems in merger and acquisition cases. The Civil Aeronautics Board will not approve an acquisition similar to the instant case unless there are provisions made for the protection of employees. See *Delta-CNS* merger case, 16 CAB Rpts. 647; *Flying Tigers-Slick* merger case, 18 CAB Rpts. 326; *Continental Pioneer* acquisition case, 20 CAB Rpts. 323.

purpose' in the Taft-Hartley Act—to substitute collective bargaining for economic warfare and to protect the rights of employees to engage in concerted activities for their own benefit. 350 U. S. at page 284. *A construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it.*" (Italics ours)

Certainly there would have been small detriment to the successor employer to have required it to have bargained with the representative of the predecessor's employees during the period of transition. Indeed the Board admits in its brief filed with the lower court (page 42) that Piasecki "would not have incurred any liability under the Act if it had met with the union prior to the time it took over the plant to explain its employment plans and to clarify any misunderstandings that had arisen in the minds of the former Bellanca employees."

Nor is the Board's frustration of the practice and procedure of collective bargaining and its promotion of industrial strife to be condoned as an exercise "of informed discretion which this court should not overrule," as opined by the lower court. The obligations cast upon Piasecki to recognize and bargain with the Unions, and the Petitioners' right to represent employees and the employee's right to be represented by a union of his choice are substantive rights created by statute and not subject to the Board's discretion, whim or caprice. Such rights are not unlike the rights which this court protected against Board nullification in *Leedom* v. *Kyne*, 358 U. S. 184. As in the *Kyne* case, *supra*, page 189, the Board has "deprived the * * * employees [and the petitioners] of a 'right' assured to them by Congress." See also *Local 24, etc.* v. *Oliver*, *supra*, page 295.

It is clear that Congress intended that the Board should

exercise jurisdiction over the "employing industry." *NLRB* v. *Colten, supra.* As noted above, the Board's declination of such jurisdiction in the instant case is contrary to the intent of Congress and the established precedent which was within the cognizance of Congress. It is not unlike the Board's unsuccessful abortive denial of the right of employees of labor organizations to enjoy the benefits of union representation which this court struck down in *Office Employes International Union* v. *NLRB*, 353 U.S. 313. Congress clearly intended that a predecessor's employees should enjoy the benefits of union representation during the period of transition of the "employing industry" from the predecessor to the successor. *NLRB* v. *Armato*, 199 F. 2d 800 (C.A. 7) Apropos is the language of this court in the *Office Employes International Union* case, *supra*:

> "* * * the Board's declination of jurisdiction was contrary to the intent of Congress, was arbitrary and was beyond its power."

See also *Hotel Employees Local No. 255, etc.* v. *Leedom*, 358 U.S. 99.

Jurisdiction to enforce Section 8(a)(5) attached to the "employing industry" and did not vanish because the successor employer declined to hire its predecessor's employees. In declining to exercise jurisdiction to enforce the rights of the predecessor's employees as "employees" under the Act to be represented by a union of their choice and the right of the union certified for the continuing appropriate units under Section 9(a) to represent such employees, the Board acted contrary to the intent of Congress explicit in the statutory language. Its declination of jurisdiction was arbitrary and beyond its power.

Nor was it within the Board's discretion to remove Piasecki as an "employer" and its predecessor's employees as "employees" from the coverage of Section 8(a)(5) of the

Act when it is clear from the Act that Congress intended them to be covered. *Office Employes International Union* v. *NLRB, supra.*

Indeed a rule of law which does such violence to the objectives of the Act, if within the area of discretion, must be a gross abuse of discretion incompatible with the statutory mandates clearly expressed in its statement of policy.

Second. The decision of the lower court is in conflict with the decisions of *NLRB* v. *Colten, supra; NLRB* v. *Armato, supra; NLRB* v. *Lunder Shoe Corp.*, 211 F. 2d 284 (C.A. 1); and *NLRB* v. *Auto Ventshade, Inc.*, 276 F. 2d 303 (C.A. 5)—all of which establish the principle that where there is a change or transfer in ownership, but the "employing industry" remains essentially the same, the purchaser or new owner is the "successor in the employing industry" and as such he is required to fulfill the statutory duty to bargain which was cast upon its predecessor. *This principle has not been passed upon by this court.* Except for the dissent, it was ignored by the lower court.

The Colten rule has been applied in numerous Board and court cases since 1939.[12] The principle has been so well-established that it has reached a status tantamount to *stare decisis.*[13] For the most part it would appear that it has

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[12] *Auto Ventshade, Inc.*, 123 NLRB 451; *J. W. Rex Co.*, 115 NLRB 775; *Cruse Motors*, 105 NLRB 242; *Southland's Tennessee Co., supra; McCarron Co.*, 100 NLRB 1537; *Stonewall Cotton Mills*, 80 NLRB 325; *Rome Products Co.*, 77 NLRB 1217; *M. M. Joffee Co., supra; Northwest Glove Co., Inc.*, 74 NLRB 1607; *National Garment Company*, 69 NLRB 1208; *Simmons Engineering Co.*, 65 NLRB 1373; *Superior Lime & Hydrate Co.*, 46 NLRB 1299; *Fred F. Knipschild*, 45 NLRB 1027; *Harry K. Phelps, Jr., Trustee*, 45 NLRB 1163; *Adel Clay Products*, 44 NLRB 386; and *Baldwin Locomotive Works*, 20 NLRB 1100, among others.

[13] The Board on this subject said in *Miller Lumber Co.*, 90 NLRB 1361, 1362 (1950):

> "This is but an application of the settled rule that the industrial strife that the Act seeks to avoid or mitigate, and the validly instituted bargaining relationships it seeks to foster, are 'no less an object of legislative solicitude where *contract*, death or operation of law brings about a change or ownership in the employing agency.'"

been accepted both by employers and employee representatives, for out of the thousands of reported acquisitions there have been comparatively few employers who have resisted the principle.

In the recent case of *NLRB* v. *Auto Ventshade, supra*, the court said:

> "The crucial question in determining if the certification is binding on the successor is whether the employing industry remains essentially the same after the transfer of ownership."

Applying this test to the instant case, Piasecki was obligated to bargain because the employing industry, as the findings of the Trial Examiner confirm, did remain essentially the same after the transfer of ownership.

The Board's landmark case, *Northwest Glove Co., Inc.*, 74 NLRB 1697, which it declined to follow in the instant case, required a successor to bargain even though the union's demand for bargaining preceded the operation of the predecessor and was served before any employee went to work. The Board held that the obligation to bargain attached before the employees went to work, and said:

> "• • • when the Union first requested resumption of negotiations, all employees of the business were in the same status of *having been laid off*." (Italics ours)

Moreover, the Board said that the obligation to bargain:

> "By its very nature and purpose, it *ran with the business;* and it is therefore binding on the successor corporation which, with knowledge [14] of its predecessor's

[14] Piasecki not only had knowledge of Bellanca's obligation to bargain but affirmatively insisted that it would deal with the employees as individuals and not with their representatives. (U–49a)

obligation to bargain, took over and continued the business." (Italics ours)

and the employees:

"* * * had a reasonable expectation of being recalled and a substantial interest in questions such as reduction in force because of conversion, selection of those to be recalled, and terms and conditions of employment upon resumption of operations."

The Board's decision in the instant case is not only in conflict with the circuit cases cited but is clearly in conflict with the *Northwest Glove* case, *supra*.

In *NLRB* v. *Armato*, *supra*, subjects for collective bargaining included rehiring of additional employees, compliance with the collective bargaining agreement [15] or, in the alternative, execution of a new agreement. This court has held that bargaining through their representatives on the subjects of collective bargaining is "a right of the employees protected by Section 7 of the Act." *Local 24, etc.* v. *Oliver, supra*.

As noted above, when the instant case was submitted to the Board the principle of *Colten* and *Northwest Glove* was well-established. Thus Congress may be presumed to have been aware of such principle when it considered the enactment of the Taft-Hartley Act in 1948. Only after an exhaustive study of the Board's decisions and their effect was the Act passed. In none of the deliberations of Con-

[15] The Board conceded in its brief to the lower court, page 46:

"There can be no doubt that the transfer of ownership of the New Castle plant left unresolved questions affecting collective legal rights of the employees covered by the labor agreement that had been in effect between Bellanca and the Union."

While the Board thus recognized the existence of these rights, it inconsistently denied the Petitioners the right to collectively bargain for such rights.

gress have we found any evidence that it was the intent of Congress to change the *Colten* rule or to exonerate successor employers from bargaining if they declined to hire the predecessor's employees. Nor was there any attempt to limit the Board's jurisdiction over the employing industry or to remove successor employers or their predecessor's employees from the coverage of Section 8(a)(5). Congress could not have intended such an incongruous result, for such result flies in the very teeth of the accepted and reapproved policies of the Act. The whole concept of "regulating the employing industry" is grounded upon the promotion of industrial peace and the practice and procedure of collective bargaining.

To affirm the lower court's decision is to find an intent on the part of Congress to flaunt its own declared purposes and policies. The words of the Act do not *clearly compel* such a strained construction. If it were the intent of Congress to regulate the "employing industry," Piasecki was obligated to bargain as a successor in the "employing industry."

Third. The cases which follow and apply the rule of the *Colten* case further hold that a mere change in ownership is not sufficient to nullify a certification. *NLRB* v. *Lunder Shoe, supra;*[10] *NLRB* v. *Armato, supra; NLRB* v. *Auto Ventshade, supra.* The lower court's decision nullified the Petitioners' certification upon the mere change of owner-

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[10] It was said in *NLRB* v. *Lunder Shoe Co., supra:*

> "If the 'employing industry' remained essentially the same after the transfer of ownership, Lunder is bound by the union certification because it is 'the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace' * * *'"

This teaching renders immaterial a finding that in order to afford validity to the certification a predecessor's employees must become "his", the successor's employees, by hire. The lower court and the Board are thus clearly in conflict with *Lunder Shoe Co., supra.*

ship. The nullification of such certification is likewise in conflict with this court's decision in *Brooks* v. *NLRB, supra.* The *Brooks* case holds that the certification must *continue* until the Board's procedures for change are invoked.[17]

In *NLRB* v. *Sanson Hosiery Mills,* 195 F. 2d 350 (C.A. 5), the court opined:

> "• • • The existing certification must be nevertheless honored until lawfully rescinded. Even if we assume that the bargaining contract was effectively terminated by the Company's notice of November 17, 1948, that fact did not of itself terminate the Union's status as bargaining representative. On the contrary that status continues until terminated by the Board, unless the Board arbitrarily refuses to act. • • • Nor can an employer decide for itself whether the union has lost its bargaining status, and deciding that it has, refuse to deal with it further. Whether the union has lost that status is for the Board to determine upon orderly statutory procedure. NLRB vs. Prudential, 154 F. 2d 385 (C.A. 6) Meanwhile it is the duty of the employer to deal with the duly certified union • • •"

Surely this language is in conflict with the lower court's opinion in the instant case.

Fourth. In construing the term "his employees" so as to exclude the discriminatees (former Bellanca employees) as employees within the meaning of 8(a)(5). The Board and the court below are in conflict with *Phelps-Dodge Corp., supra,* for the reason that such decision requires that for the interpretation of 8(a)(5) one must look to Section 9(b) and Section 2(3), which the Board and lower court did not do. They treated 8(a)(5) in isolation without reference to other pertinent parts of the Act. Moreover, they departed

[17] Piasecki did not institute action under Section 9(c)(B) of the Act to test the Petitioners' certification as was its right.

from the teachings of this court in *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 286, in which case this court cautioned against a construction that "would produce incongruous results."

Such construction is also in conflict with *NLRB* v. *Hearst Publications*, 322 U. S. 111. The court said:

> "The word (employee) 'is not treated by Congress as a work of art having a definite meaning * * *'. Rather 'it takes color from its surroundings * * * (in) the statute where it appears * * * and *derives meaning from the context of that statute which' must be read in the light of the mischief to be corrected and the end to be attained* * * *
>
> "* * * In this light, the board language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee', 'employer', and 'labor dispute', leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts, rather than technically and exclusively by previously established legal classifications * * *
>
> "The term (employee) like other provisions, must be understood with reference to the purpose of the Act and facts involved in the economic relationship. *'Where all the conditions of the relation required protection, protection ought to be given.'* " (Italics ours)

Of all employees who need protection, surely those who are middle-aged or past, as many are in this case, and who have lost their employment by reason of the sale or transfer of their employer's business, stand in the front ranks of those who need protection and to whom this court must have referred. *Moreover, the mischief which Congress sought to correct by regulating the employing industry in its transi-*

tion from predecessor to successor was the industrial unrest which must be attendant if the industrial problems involved in successor situations are left to the law of the jungle.

In the *Phelps-Dodge* case, *supra,* it is stated that in determining who are "his employees" as used in 8(a)(5) one must look to Sections 9(b) and 2(3). Section 2(3) provides:

> "The term 'employee' shall include any employee, and *shall not be limited to employees of a particular employer,* unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute *or because of any unfair labor practice,* and who has not obtained any other regular and substantially equivalent employment * * *" (Italics ours)

Under this definition not only are the discriminatees employees under its general terms, but they are also employees because their employment ceased "because of an unfair labor practice" so found by the Board.

Moreover, Section 9(a) provides that the chosen bargaining agent "shall be" the exclusive representative of *the* employees in an appropriate unit:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *"

The Unions, once selected as the bargaining agent in accordance with this section by a majority of the employees as defined in Section 2(3) in the appropriate unit in the "employing industry" continued by Piasecki, were entitled to continue such representative status upon Piasecki's ac-

quisition.[18] The bargaining rights did not die for such unit at the will of Piasecki. *Brooks* v. *NLRB, supra; NLRB* v. *Sanson Hosiery Mills, supra.* If one applies the Board's reasoning affirmed by the court, the conclusion obtains that a bargaining agent's right continues only if the successor puts to work its predecessor's employees.[19] The decision makes the choice of bargaining agent with the successor employer and not in conformity with the mandates of Section 9.

The fact that Congress has not disturbed the principle set forth in the *Colten* case that "it is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace," confirms the conclusion that it was the intent of Congress that in situations such as the instant case the representative status of the certified union should continue. Clearly it survives a change of ownership. To construe Section 8(a)(5) as did the Board and the lower court would abrogate Section 9.

Considered together, Sections 8(a)(5), 9(a) and 2(3) confirm that Piasecki is guilty of a refusal to bargain under Section 8(a)(5). Clearly the discriminatees are *laid off* employees in the employing industry or *employees whose work has ceased by reason of Piasecki's unfair labor practices.* Even if the discriminatees were not employees within the meaning of 8(a)(5), the right to bargain in the appropriate unit which matured under Section 9(a) continued into the successorship. "* * * mere change of employers

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[18] There is nothing in the statute which would indicate that a union's representative status ceases in the event the employer replaces all its employees who participated in the designation of the bargaining representative. *Cf. NLRB* v. *Warren Co., Inc.,* 350 U. S. 107; *Brooks* v. *NLRB, supra; American Seating Co.,* 106 NLRB 250, 252.

[19] The right to representative status has been construed to continue when only 8 out of 25 employees hired were the predecessor's employees and 17 were newcomers. *NLRB* v. *Armato, supra.*

does not operate to destroy the effectiveness of the certification." *NLRB* v. *Armato, supra* and *Brooks* v. *NLRB, supra.*

For another reason, the Board's strained construction of the term "his employees" in 8(a)(5) is contrary to the express language of the statute. Since the initial passage of Section 8(a)(5), Congress enacted Section 8(d), which imposes upon the employer the duty to bargain with "the representatives of the employees." Section 8(d) was placed in the Act by the 80th Congress for the express purpose of defining the bargaining duties under 8(a)(5) and in this respect must modify or supersede 8(a)(5). (Report to Accompany S. 1126, page 24, Senate Committee on Labor and Public Welfare) If 8(a)(5) and 8(d) are read together, Piasecki's obligation under 8(d) is to meet and confer with "the representatives of the employees." There can be no doubt that the Petitioners were such representatives and had been so designated and certified under Section 9(a). Moreover, the discriminatees are "the employees" referred to in 8(d). "The employees" as used in 8(d) are those individuals who come within the definition of "employees" in Section 2(3). Since Section 8(d) does not limit employees to a particular employer, it is even more clear that the discriminatees need not to have been hired by Piasecki to have been employees within the meaning of 8(d) and 2(3). Employees who were not hired after a shutdown were held to be employees within the meaning of 8(a)(5). *NLRB* v. *Sifers Candy Co.*, 171 F. 2d 63 (C.A. 10).

The Board failed to consider Section 8(a)(5) together with Sections 2(3), 8(d), 9(a) and 9(b). Even though not one discriminatee was hired under these sections, Piasecki had the obligation to bargain because the Unions were the bargaining representative in the appropriate unit which Piasecki acquired upon the purchase of Bellanca, and because the discriminatees were "employees" within the meaning of the Act. It is significant that Justice Brennan

said in *Local 24, etc.* v. *Oliver, supra:* "to encourage the employer and the representative of *the* employees * * *" (Italics ours)

Upon the acquisition by Piasecki, the discriminatees (former Bellanca employees) were "the employees" within the appropriate unit referred to in Section 8(d) in respect to whom Piasecki was required to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment," including, as was said in *Northwest Glove, supra,* page 1701, "reduction in force," "selection of those to be recalled" and "terms and conditions of employment upon resumption of operations."

Congress may be presumed to have been aware of the principle in the *Colten* and *Northwest Glove* cases when it incorporated Section 8(d) in the Act. The fact that Congress used the term "representatives of the employees" is evidence of the fact that it did not want to disturb the rule nor to limit the definition of "employee" in Section 2(3) and that it was content that the "employing industry," such as the one continued by Piasecki, be regulated.

The Board's limitation placed on the words "his employees" used in 8(a)(5) not only results in frustration of the practice and procedure of collective bargaining and promotes industrial unrest, but such limitation is irreconcilable to this court's view of a lawful interpretation of the Act in *NLRB* v. *Lion Oil Co., supra,* page 288.

The construction placed upon "his employees" by the Board will encourage successor employers to decline to hire its predecessor's employees in order to avoid collective bargaining with the bargaining agent of the predecessor's employees; it will cast on the labor market older employees; it will foster disorder and industrial strife, as is evident in the instant case; it will induce a labor rep-

resentative to strike the predecessor in order to protect itself against its successor. The words of Congress do not "clearly compel" these results.

Moreover, the Board with court approval applied a strained and niggardly construction to the Act. In holding that the discriminatees were not Piasecki's employees within the meaning of 8(a)(5), the Board used 8(a)(5) as a precise mathematical formula rather than the guide which the Act intended to insure the attainment of the Act's humanitarian aims. As Justice Frankfurter, in *Phelps-Dodge* v. *NLRB, supra,* has said in reference to the definition of employee, "unlike mathematical symbols the phrasing of such social legislation as this seldom attains more than approximate precision in definition. That is why all relevant aids are summoned to determine its meaning * * *".

The Board and the court in their decisions ignored completely the relevant aids to the determination of the status of the discriminatees which may be found in the statement of the Act's policy and purposes, in the other sections of the Act, the legislative history and the decisions of the courts.

Fifth. The lower court's holding that between the dates of October 24 and November 23, 1956, Bellanca employees did not become the employees of Piasecki is in conflict with the principles of this court in *NLRB* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 263, and *NLRB* v. *Concrete Haulers, Inc.,* 212 F. 2d 477, 479 (C.A. 5).

An employer is defined in Section 2(2):

> "The term 'employer' includes any person acting as an agent of an employer directly or indirectly * * *"

Piasecki became an employer of Bellanca personnel for the following reasons:[20]

1. Piasecki integrated its operations with those of Bellanca and utilized Bellanca facilities and personnel by working with Superintendent Pasquarella in estimating future personnel needs and planning assumptions (U–6a, 7a, 16a, 17a); by conferring with and offering jobs to supervisory personnel (U–5a-15a); by making all purchases for work-in-process for the Bellanca operations utilizing Bellanca personnel as well as its own (U–27a, 28a, 37a-45a); by performing its own work in the plant (U–20a, 22a, 43a, 43b); by utilizing Bellanca employees for taking inventory (U–40a, 41a); by obligating Piasecki for Bellanca employee's phone calls (U–41a); and by employing Bellanca employees for the purchase of materials for work to be completed after November 21 (U–43a).

2. By causing the discharge of all employees covered by the agreement between Bellanca and the Unions.

3. By the coincidence of the interests of Piasecki and Bellanca under the agreement of October 24.

By the agreement of October 24th, Piasecki controlled the tenure of the Bellanca employees and such control was at its insistence. (U–49a) Bellanca's interest in ceding the right to discharge Bellanca's employees was not academic; Bellanca had a real interest not only in effecting the sale but cooperating with Piasecki to the end that Piasecki might be successfully able to meet its deferred payments under the contract. Moreover, Piasecki had assumed a mortgage for which Bellanca was primarily liable. (U–91a)

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[20] The General Counsel also urged this contention before the Board. (U–75a-76a.)

Bellanca and Piasecki fall within the language in the case of *NLRB* v. *Pennsylvania Greyhound Lines, supra*:

> "* * * Together, the Respondents act as employers of these employees * * * and together actually deal with labor relations of these employees."

Sixth. If there be substance in the argument that employees must be hired in order that the principle of the *Colten* case applies, such was complied with in the instant case, since at least one worker in each unit was hired. Thus, in any event, the rights of the Petitioners have been withheld and employees have been deprived of rights assured them by Congress. *Leedom* v. *Kyne, supra.*

II. *In holding that Piasecki was not obligated to bargain with the Petitioners on or after November 26, the date on which the Petitioners would have represented a majority of the employees in an appropriate production and maintenance unit except for Piasecki's discrimination, the lower court has rendered a decision in conflict with principles laid down and accepted in other courts and has decided an important question of federal law which has not been but should be settled by this court.*

The Petitioners in their exceptions filed to the Board excepted to the Trial Examiner's failure to find that the former Bellanca employees who were discriminated against were employees at all times pertinent for the purpose of determining the majority status of the Unions and that on and after November 25 Piasecki's refusal to bargain was in violation of 8(a)(5). (U-56a, par. (5), (8)) The Board did not specifically pass upon such exceptions and by inference we assume such exceptions were denied.

The lower court, like the Board, left unsettled whether or not the discriminatees as of the date of discrimination must be considered as employees for the purpose of fixng the employer's obligation to bargain under Section 8(a)(5) of the Act. *The question has not been heretofore before this court.* Such question is important in respect to the administration of the Act, in that if individuals who are discriminated against at the portals of the plant are not to be considered employees for the purpose of determining the majority representation of a union, an employer may forestall its potential obligation to bargain by discriminating against prospective employees whom it knows are favorable to a labor organization. The incongruous result will be that it will have relieved itself of the obligation to bargain under 8(a)(5) by violating Section 8(a)(3).

It is our view of the law that such discriminatees became employees within the meaning of Section 8(a)(5) for the purpose of determining majority representation and the collective bargaining obligations of the employer who discriminated against them. If such view is sound, Piasecki became obligated to bargain with the Unions on November 25, the date on which the discrimination was effected, because on that date the discriminatees, a majority of the employees of Piasecki in the production and maintenance unit, had designated the Petitioners as their exclusive bargaining agent. Such view is in accord with the Board's past decisions in that the Board has held discriminatees must be counted for the determination of a union's majority status. *Keeshin Poultry Co.*, 97 NLRB 467, 472; *Sioux City Brewing Co.*, 85 NLRB 1164, 1166; *Ann Arbor Press*, 88 NLRB 391, 394; *Venango Plastics, Inc.*, 119 *NLRB* 1318, 1321; *Rudolph Wurlitzer Company*, 41 NLRB 1074; *M. M. Joffee, supra.*

In *Venango Plastics, Inc., supra*, the Board said:

> "They were discriminatorily discharged or laid off before the election, and, therefore, retained their status as employees eligible to vote."

In the instant case the Board conceded that had not Piasecki engaged in illegal discrimination the employees would have become the employees of Piasecki and Piasecki would have been obligated to bargain with the Unions upon request.[21] The failure of the Board and the court below to advance a step further and hold that upon the illegal discrimination of Piasecki these persons became employees of Piasecki for the purposes of 8(a)(5) is, we assert, in conflict with the established principle in other circuits that discriminatees are considered employees for the purpose of determining the majority representation of a union and the collective bargaining obligations of the employer.

Moreover, by acts of discrimination the employer profits by its own wrong in that it relieves itself of the obligation to bargain until such time as it is required to reinstate the discriminatees.[22] To require the employer to bargain from the date of discrimination will add a determent to the employer's use of a discriminatory device to forestall the attachment of his bargaining obligations. Certainly it was the intent of Congress that such discriminatees should be considered as employees within the meaning of 8(a)(5) and that the employer may not delay the assumption of his bargaining responsibilities.

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[21] Justice Frankfurter said in *Social Security Board v. Nierotko*, 327 U.S. 366: "The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another, though he be inactive."

[22] By such time the bargaining representative may have lost its majority status. For example, discriminatees who have found other employment may not elect to return to work.

In holding that the discriminatees did not become employees of Piasecki under 8(a)(5) at the time Piasecki perpetrated its acts of illegal discrimination, the Board's and the lower court's decisions are in conflict with *NLRB* v. *Cape County Milling Co.*, 140 F. 2d 543 (C.A. 8), and in conflict with the principles laid down and applied in *NLRB* v. *Lamar Creamery Co.*, 246 F. 2d 8 (C.A. 5); *Phelps-Dodge* v. *NLRB, supra,* 187; and *NLRB* v. *Sifers, supra.*

NLRB v. *Sifers, supra,* involved a lockout and discriminatory hiring. In the *Sifers* case, as in the instant case, discriminatees were denied jobs. Nevertheless, the court held that "they remained employees for the purpose of determining majority representation of the Union and collective bargaining obligations of the Respondent."

III. *The lower court, in holding that the Board may reject a legal contention of a charging party without passing on its merits on the sole ground that the General Counsel declined to join in such contention, is in conflict with the principles laid down and accepted by other circuits and the court has decided an important question of federal law which has not been but should be settled by this court. Such decision calls for this court's power of supervision.*

The complaint alleged that "On or about November 6, 1956, and all times since, the Respondent did fail and refuse and continues to fail and refuse to bargain collectively with the Union as exclusive bargaining representative of the employees in each of the units described in paragraph 12 above" and that "the acts of the Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections * * * (a)(5) * * *" (P-10a-11a).

Under these allegations the General Counsel contended (U–77a-87a) that Piasecki was obligated to bargain with the Unions in conformity with 8(a)(5) on the ground that it was a "successor in the employing industry." The Petitioners joined in such contention but also contended that, since the contract between Bellanca and the Unions was binding upon Piasecki, Piasecki was obligated to bargain with the Unions in conformity with Section 8(a)(5) during the period of the contract. The Board and the court below rejected this contention on the sole ground that the General Counsel did not join in such contention.[23]

Had the General Counsel joined in such contention and such contention would have been considered by the Board and the lower court, an 8(a)(5) violation would have been found if the contract was a binding obligation on Piasecki and if the Board followed past precedents. *California Footwear Co.*, 114 NLRB 765, *aff'd. NLRB* v. *Lewis*, 246 F. 2d 886 (C.A. 9); *Butler Chemical Co.*, 116 NLRB No. 87; *Hexton Furniture Co.*, 111 NLRB 342; *Royal Cotton Mill Co., Inc.*, 109 NLRB 186; *Sanson Hosiery Mills, Inc.*, 92 NLRB 1102.

In the *California Footwear* case, *supra*, the Board said, page 770:

> "As the contract was still 'in effect' at the time the Respondents refused to apply it to the Venice employees and unilaterally changed the wages and working conditions of their employees, we find, in agreement with the Trial Examiner, that the Respondents thereby unlawfully refused to bargain with the Union, within the meaning of Section 8(d) and Section 8(a)(5)."

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[23] The rejection of this contention shall have serious impact on industrial peace since many collective bargaining agreements contain successorship clauses. (See Appendix C)

In the *Hexton Furniture* case, *supra*, the Board said, page 344:

> "Accordingly, by withdrawing recognition from the Union during the middle of a contract term, the Respondent unlawfully refused to bargain with the Union."

These decisions make clear the fact that a statutory obligation to bargain attaches during the period of a binding contract. Moreover, Section 8(d) makes it absolutely clear that the obligation to bargain requires the parties to bargain in respect to "any question arising" under a contract.

The Trial Examiner declined to consider the merits of the Petitioners' contention for several reasons. One reason was that the argument was not grounded under the allegation in the complaint that the Respondent was under a statutory obligation to bargain with the Unions. Such reason is without merit since the Board, as noted above, in numerous cases has found that the employer has the statutory obligation to bargain during the period of a contract.

The Trial Examiner has confused the statutory obligation to bargain with a contractual duty to bargain. While there may have been a contractual duty to bargain, the Petitioners argued that the Respondent was under a statutory duty to bargain in conformity with Section 8(a)(5). Thus it is clear that the argument of the Petitioners was embraced in the complaint. It is further clear that even though it were conceded that the General Counsel has the authority and power to determine the scope of the complaint, the scope of the complaint embraced the Petitioners' arguments which supported the 8(a)(5) allegations in the complaint.

In respect to the General Counsel's position, there is no evidence that the General Counsel asserted that the argument of the Petitioners did not fall within the allegations of the complaint. His position simply was that he declined to join in the argument that the contract as a binding instrument on Piasecki obligated it to bargain under 8(a)(5).

It is clear from the Trial Examiner's report that had the General Counsel joined in the argument of the Unions he would have considered it upon its merits. Therefore his report left for the Court of Appeals the question to be answered whether the Board may reject an argument advanced by a charging party in support of an 8(a)(5) allegation which is not joined in by the General Counsel.

The Court of Appeals met the question and stated the objection of the Petitioners "that the Trial Examiner and the Board erred in confining the issues to the legal position taken by the General Counsel, who declined to adopt the contention of the Union that the said contract bound Piasecki." The lower court did not remand the case to the Board for the purpose of the Board's making a finding on the binding effect of the Union's contract. Its refusal to do so was based upon the proposition that the General Counsel under Section 3(d) of the Act had within his domain the right to formulate the complaint and its prosecution. Neither Section 3(d) nor the case cited by the lower court in support of such proposition are applicable to the Petitioners' objection. The record in this case indicates that the evidence adduced by the General Counsel was sufficient to support the contention advanced by the charging parties. The General Counsel introduced into evidence G.C. Ex. 3, the contract between Bellanca and the Unions, which by its terms was binding on Piasecki. (U-93a) *Polaner* v. *Gold Metal Grill, Inc.*, 52 O.O. 282, 117 N.E. 2d 62.

The question simply is: Are the rights of charging parties limited to the legal position assumed by the General Counsel, or is a charging party permitted to make an argument or contention based upon the evidence in the record which is not joined in or approved by the General Counsel?

The effect of the lower court's decision is to confine the charging parties to the legal position taken by the General Counsel as to matters which may be presented to the Board in support of 8(a)(5) allegations in a complaint. The lower court, in the case of *Marine Engineers' Association* v. *NLRB*, 202 F. 2d 546, 549 (C.A. 3), concedes that once a complaint is issued the charging party has "some standing":

> "* * * he is entitled to have a chance to be heard as the Administrative Procedure Act requires. He has a right to object if after hearing he does not like the result. * * *"

In the instant case the Charging Parties were denied the right to be heard, in that their contention that the contract was a binding obligation on Piasecki was rejected without passing on its merits for the sole reason that such contention had not been joined in by the General Counsel. Such was in contradiction of the Board's own rules, Section 102.38, and the Administrative Procedure Act, 5 U.S.C. 1006(c).

It has been held that a charging party is a person aggrieved under Section 10(f) of the Act. *Kovach* v. *NLRB*, 229 F. 2d 138, 142 (C.A. 7); *Albrecht* v. *NLRB*, 181 F. 2d 652, 654 (C.A. 7) Such statute contemplates that a party may advance a legal position for the purpose of eliciting an adjudication from the Board; otherwise the statute would have no import.

The right to obtain a review must carry with it the right

to have the agency from which the appeal is taken pass upon the contentions of the party. As the decision of the lower court now stands, the General Counsel is the sole judge of whether the Board may or may not consider a legal contention advanced by a charging party, whether it be a corporation, individual, or a labor organization.

Moreover, the decision of the lower court is in conflict with the principles applied in *International Union* v. *NLRB*, 231 F. 2d 237 (C.A. 7). While in that case the court held that the General Counsel as prosecutor had power to enter into a stipulation in which the charging party did not concur, "to the extent it did not join in the stipulation, it was entitled to submit evidence to contradict or explain the parts thereof in which it did not join." It is clear that under such case a charging party was permitted to advance a legal position which was not joined in by the General Counsel. Indeed this court noticed a contention of a charging party through Justice Harlan in *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 360, Footnote 3.

The Petitioners complaint is not that the lower court passed erroneously on its contention, as apparently believed by the lower court, but its objection is that the Trial Examiner, the Board and the lower court did not consider its contention based upon the sole ground that it was not joined in by the General Counsel. If such a rule is to be adopted, in order for a charging party's position to be considered by the Board its position must be condoned by the General Counsel. Such a construction not only will do violence to the intent of the statute to separate the prosecuting from the adjudicating function but will cede a part of the Board's adjudicating function to the General Counsel. *Lewis Food Co.* v. *NLRB*, 357 U.S. 10, 16, Footnote 10. Being wholly confined in its presentation of its case and its arguments to the Board by the General Counsel, the right of a charging party to appeal as an aggrieved party becomes a nullity.

While it is clear that the legal conclusions drawn by the Charging Parties in respect to the binding effect of the Bellanca contract do not allege a different violation of the statute but are in support of a specific allegation in the complaint, if the Unions' assertions were in the nature of an amendment the General Counsel would have no control over its presentation, since the statute specifically provides in Section 10(b):

> "* * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *"

Thus, if an amendment were necessary, there were no jurisdictional impediments to the Board's making such amendment on its own motion in the furtherance of justice.

Where it is evident from the record that the employer has refused to recognize the union and bargain with it during the term of a valid contract, simple justice demands consideration thereof. Surely it is not within the province of the General Counsel to take such issue out of contention because he does not agree with the legal position taken by an asserting charging party, whether it be employer, individual, or employee representative.

IV. *In holding that the termination notice requirements of Section 8(a)(d) are not applicable to contracts binding upon successors in the employing industry, the lower court has rendered a decision in conflict with the principles laid down by this court.*

The lower court's decision, which may relieve a successor employer otherwise bound by a collective bargaining agreement because 8(d) is not applicable to its termination pro-

visions, is not reconcilable with this court's decision in *NLRB* v. *Lion Oil Co.*, *supra*, pages 292, 293:

> "* * * One thing the most authoritative legislative gloss on Section 8(d), the report of the Senate Committee, makes clear is that the statutory notice requirement operates wholly independently of whatever notice requirement the parties have fixed for themselves. * * *"

nor the Board's decision in *California Footwear Co.*, *supra*, page 770 (*aff'd.* 246 F. 2d 886 (C.A. 9)):

> "* * * the contract must therefore be deemed to have remained 'in effect' until it could be lawfully terminated in accordance with the requirements of Section 8(d)." [24]

In *NLRB* v. *J. I. Case Co.*, 134 F. 2d 70, 72 (C.A. 7), *aff'd* 321 U.S. 332, the court said:

> "Contracts must be understood as having been made not only with reference to existing legislation but also with reference to the possible exercise of any rightful authority of the Government and no obligation of existing contract may be invoked to defeat that authority. (citations)"

Assuming that a collective bargaining agreement may be binding on a successor if the agreement so provides, *Polaner* v. *Gold Metal Grill, Inc.*, *supra*, the lower court failed to give statutory sanction to Section 8(d) as required by the section and the courts which have spoken on the subject.

CONCLUSION

The evil in the lower court's decision stems from the fact that it has approved a Board decision which has created a no-man's land of unregulated industrial conflict in which regulation was intended by Congress and imposed by the

[24] This case involved a successor.